Supreme Court of the United States

OCTOBER TERM, 1948

No. 554

ELIJAH CRIPPEN, TRUSTEE OF LONE STAR AIR CARGO LINES INC., BANKRUPT,

Petitioner,

v.

CITY OF DALLAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court:—

Elijah Crippen, Trustee in Bankruptcy of the Lone Star Air Cargo Lines, Inc., Bankrupt, Petitioner herein, presents herewith his petition for writ of certiorari and respectfully shows:—

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This case started by the Trustee filing and presenting to the Referee in Bankruptcy his applications to classify and expunge certain tax claims filed in the bankrupt estate.

(R. pp. 31-41.) He questioned the legality of the lien which the City of Dallas, Respondent, asserted it had as of January 1, 1947, to secure the payment of taxes assessed upon personal property of the Bankrupt for the year 1947. (R. pp. 31-41.)

Respondent claimed it had a lien for these personal property taxes before bankruptcy intervened on February 26, 1947. If it did, Sections 64 and 67 of the Bankruptcy Act *(11 U. S. C., Secs. 104* and *107)* are the authority for the Respondent to be paid ahead of the Collector of Internal Revenue, who did not claim a lien. Otherwise, these two governmental agencies would be on a parity as provided by Section 64 of the Bankruptcy Act *(11 U. S. C., Sec. 104)*.

The Referee held that the Respondent had no lien and that its tax claim should be classed as to priority in accordance with Section 64a (4) of the Bankruptcy Act. (R. pp. 11-12.) On petition for review, the district judge affirmed this order of the Referee. (R. pp. 70-76.) On appeal to the Court of Appeals for the Fifth Circuit, that court, in a divided opinion, reversed the District Court. (R. pp. 89-100.)

II.

STATEMENT DISCLOSING THE BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS

Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 [Title 28 U. S. C., Section

347(a), and which in the 1948 revision of Title 28 U. S. C. is Section 1254] is the statutory authority for this Honorable Court to exercise its jurisdiction in this case, by requiring that it be certified to this Court for determination and correction of the grievous errors committed below in this bankruptcy proceeding.

It is submitted that this is a case which this Court should supervise by granting a writ of certiorari, since the decision of the lower court is contrary to the law of Texas and to Section 67b of the Bankruptcy Act and involves the important question of the fiscal relationship between the City of Dallas, a subdivision of the State of Texas, and the Federal Government. Where a similar important question was involved, this Honorable Court granted its writ of certiorari in *United States v. State of Texas, 314 U. S. 480, 62 Sup. Ct. 350.*

On December 10, 1948, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the District Court, and on January 10, 1949, overruled the petition for rehearing which had been filed by the Petitioner on December 31, 1948; and this petition for writ of certiorari is applied for within ninety days from the final action of the United States Court of Appeals. (28 U. S. C., Sec. 2101).

III.

QUESTIONS PRESENTED

(1) Whether Section 194 of the charter of Respondent is valid and constitutional under the law of Texas to the end

that the Respondent had a valid lien as of January 1, 1947, securing the payment of taxes assessed by it on the personal property of the Bankrupt for the year 1947.

(2) Whether the Respondent had a valid statutory lien for taxes as of January 1, 1947, valid within the meaning of Section 67b of the Bankruptcy Act [11 U. S. C., Sec. 107(b).]

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

(1) In holding that the Respondent had a lien as of January 1, 1947, to secure the payment of taxes assessed by it on personal property of the Bankrupt for the year 1947, the lower court upheld the validity of Section 194 of the charter of the Respondent, whereas the law of Texas demands that said charter provision be held invalid, and the lower court failed and refused to follow such Texas law in the following particulars:—

(a) Article 1060 of the Texas Statutes provides that all taxes on personal property shall be a lien upon the property on which they are assessed, and has been construed to make such lien effective from the date of assessment. (Appendix p. i.) [*Mission Independent School District, et al. v. Armstrong, 222 S. W. 201: In re Brannon, et al., Fifth Circuit, 62 Fed. (2d) 959.*] Section 194 of the charter of the City of Dallas, Respondent, provides that a lien on personal property shall exist from January 1st of each year, and further provides that the personal property of any taxpayer is liable for all the taxes owing by that taxpayer

whether the same be on personal or real property, or both. (Appendix p. ii.) It is obvious that these two laws conflict, at least as to the time from which the lien is effective and the amount of taxes for which the lien is granted. Article 1060 has been a part of the general laws of the State of Texas since it was originally passed in 1875 and is applicable to all cities, towns and villages. (Title 28, Article 1060, Vernon's Texas Civil Statutes—the title of which is "Cities, Towns and Villages"). Therefore, Section 194 of the charter of the City of Dallas is invalid because it violates Section 56 of Article III of the Texas Constitution, which prohibits the Legislature from passing any such law for a city by special act which contravenes any general laws on the same subject (Appendix p. ii), as has been unequivocably held in *City of Beaumont v. Fall, 291 S. W. 202*, and *Brown v. Fidelity Investment Co., 280 S. W. 567*. These cases, by the Commission of Appeals of the State of Texas and adopted by the Supreme Court, were not followed by the court below in holding that the special act of the Texas Legislature, in granting the City of Dallas its charter in 1907, was of equal dignity with Article 1060, and that Article 1060 had reference merely to liens for state and county taxes. Article 1060 has reference only to cities, towns and villages, and other articles of the Statutes, to-wit: Title 122, Articles 7266-7274, inclusive, Vernon's Texas Civil Statutes, refer to state and county taxes on personal property, as is well set out in *In re: Brannon, et al., 62 Fed. (2d) 959*, from which the lower court cites.

(b) And whether Respondent is considered a home rule city, which in fact it was for some time prior to this litigation (R. pp. 17, Findings of Referee, and 57, Agreement of Parties), Section 194 of its charter is invalid because it contravenes Section 5 of Article XI of the Texas Constitution, which states that no charter or any ordinance shall contain any provision inconsistent with the Constitution or the general laws of the State, in that it conflicts with Article 1060 which is a general law applicable to all cities, towns and villages. *City of Beaumont v. Fall, supra*, and *Brown v. Fidelity Investment Co., supra*, both hold that a home rule city may not enforce a law which is contrary to the general laws governing cities of the same class. The lower court refused to follow this Texas law irrespective of the fact that Article 1060 has been held to apply to home rule cities in *City of Lubbock v. South Plains Hardware Co., 111 S. W. (2d) 343; Texas Land & Cattle Co. v. City of Fort Worth, 73 S. W. (2d) 860; City of San Angelo v. Deutsch, 91 S. W. (2d) 308;* and irrespective of the fact that Article 1060 is a general law applicable to all cities, towns and villages in the State of Texas. That a city in Texas has taken advantage of the constitutional provision to become a home rule city does not give it any power to enact any charter provision or ordinance which is inconsistent with any general law passed by the Legislature of the state in contravention of Section 5, Article XI, of the Texas Constitution. [*Texas Power & Light Co. v. Brownwood Public Service Co., 111 S. W. (2d) 1225; City of Lubbock v. Magnolia Petroleum Co., 6 S. W. (2d) 80; Prescott v. City of Borger, 158 S. W. (2d) 578.*]

(c) Another provision of Section 56, Article III, of the Texas Constitution prohibits the Legislature from passing any local or special law authorizing the creation, extension, or impairing of liens. Article 194 of the charter of the Respondent is clearly a local law with respect to the creation of liens, since it is applicable only to the City of Dallas and, therefore, is contrary and violative of this constitutional provision. *Anderson, et al. v. Brandon, et al., 47 S. W. (2d) 261.*

(2) The lower court's opinion is contrary to and in conflict with *Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817; Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860; West v. American Tel. & Tel. Co., 311 U. S. 223, 61 Sup. Ct. 179; Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 Sup. Ct. 1020;* and *Stoner v. New York Life Ins. Co., 311 U. S. 464, 61 Sup. Ct. 336;* in that the lower court has failed and refused to apply the law of Texas in determining the legality of the Respondent's asserted lien, as is specifically pointed out in the foregoing paragraphs (1), (a), (b) and (c).

(3) This important question of Texas law which has been erroneously decided by the lower court, if permitted to stand, will rule every bankruptcy proceeding in which a city in Texas asserts any taxes on personal property of the bankrupt and will validate the asserted liens for such taxes to the detriment of all other governmental agencies and settle the fiscal relationship between a Texas city and the Federal Government contrary to all the Texas law on the subject and in disregard of the classification of priori-

ties and claims secured by lien, under Sections 64 and 67 of the Bankuptcy Act (11 U. S. C., Secs. 104 and 107). A similar question was the basis of this Honorable Court granting a writ of certiorari in *United States v. State of Texas, 314 U. S. 480, 62 Sup. Ct. 350.*

(4) The lower court, in holding that the Respondent had a statutory lien for taxes valid within the meaning of Section 67b of the Bankruptcy Act (11 U. S. C., Sec. 107), has decided an important question of federal law in a way probably in conflict with *Illinois v. Campbell, 329 U. S. 362, 67 Sup. Ct. 340; New York v. Maclay, 288 U. S. 290, 53 Sup. Ct. 323; Spokane County v. United States, 279 U. S. 80, 49 Sup. Ct. 321; United States v. State of Texas, 314 U. S. 480, 62 Sup. Ct. 350;* and *United States v. Waddill, et al., 323 U. S. 353, 65 Sup. Ct. 304;* in that this Honorable Court in each of these cases defined a true statutory lien to be one definite and not merely ascertainable in the future by taking future steps with respect to the identity of the lienor or the amount of the lien or the property to which it attaches. Whatever the Respondent had was certainly indefinite, because no assessment had been made for the taxes and the amount was uncertain.

Petitioners file herewith certified transcript of the record, including the proceedings in the United States Court of Appeals below.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that court to certify and

send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings in the cause entitled City of Dallas, Appellant v. Elijah Crippen, Trustee of Lone Star Air Cargo Lines, Inc., Bankrupt, et al., Appellees, No. 12464 on the docket of said court to the end that the case may be reviewed and determined by this Court as provided by law, that the judgment of said United States Court of Appeals may be reviewed, and that your Petitioner may have such other and further relief and remedy as this Court may deem appropriate and in conformity with law.

Respectfully submitted,

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Supreme Court of the United States

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BRIEF IN SUPPORT OF PETITION

JURISDICTIONAL GROUNDS

The opinion and judgment of the Court of Appeals for the Fifth Circuit were rendered December 10, 1948. (R. pp. 89-100.) The majority and the dissenting opinion have not yet been reported. Petition for rehearing was filed December 31, 1948 (R. pp. 101-108), and the order denying the rehearing was entered January 10, 1949. (R. p. 109.)

It is sought to bring this case before this Court on a petition for writ of certiorari as provided by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 [Title 28, U. S. C., Section 347(a), and which in the 1948 revision of Title 28, U. S. C., is Section 1254], and it is submitted that this is a case which this Court

should supervise by granting a writ of certiorari, since the decision of the lower court is contrary to the law of Texas and to Section 67b of the Bankruptcy Act and involves the important question of the fiscal relationship between the City of Dallas, a subdivision of the State of Texas, and the Federal Government. In *United States v. State of Texas, 314 U. S. 480, 62 Sup. Ct. 350,* this Honorable Court granted its writ of certiorari where the fiscal relationship between the State of Texas and the Federal Government was involved.

STATEMENT OF THE CASE

A petition for reörganization of Lone Star Air Cargo Lines, Inc., was filed on February 26, 1947, but the corporation was adjudged a bankrupt on March 19, 1947. (R. p. 13.) On September 23, 1947, or approximately seven months after the effective date of bankruptcy, the Respondent, on the basis of the inventory properly filed in the Bankruptcy Court, made an assessment of personal property and assessed ad valorem taxes thereon of $2,817.23 for the year 1947. (R. pp. 53-54; 15.) The Respondent claimed that it had a lien from January 1, 1947, to secure the payment of these taxes under and by virtue of Section 194 of its charter. (R. pp. 25-30; Appendix, p. ii.) Nevertheless, the Respondent had not taken possession of the personal property nor sought to enforce its lien by any sale before bankruptcy. (R. pp. 16; 58.)

John B. Dunlap, Acting Collector of Internal Revenue for the Second Collection District of Texas, filed his claim on behalf of the United States in the bankrupt estate for

Social Security, withholding, and miscellaneous taxes in the sum of $19,760.79 (R. pp. 42-49), but asserted no lien.

Petitioner filed his application to classify these claims and for an order of distribution thereon. (R. pp. 31-41.) He questioned the legality of the lien which the Respondent asserted as of January 1, 1947, to secure the payment of taxes assessed upon personal property of the Bankrupt for the year 1947, and took the position that the claim of the Respondent, City of Dallas, and of the United States, represented by the Acting Collector of Internal Revenue, should be on a parity and be classed under the priority Section 64 of the Bankruptcy Act (11 U. S. C., Sec. 104). The Referee in Bankruptcy ruled that the Respondent had no lien and that its tax claim should be classed as to priority in accordance with Section 64a (4) of the Bankruptcy Act and be on a parity with that of the United States. (R. pp. 11-12.) On petition for rehearing the District Judge affirmed this order of the Referee. (R. pp. 70-76.) On Appeal to the Court of Appeals for the Fifth Circuit, that court, in a divided opinion, reversed the District Court and held that the Respondent had a lien to secure its taxes and should be paid ahead of the United States. (R. pp. 89-100.)

The Trustee does not have enough available money to pay the administration costs and the respective claims of the Federal Government and the City of Dallas. (R. pp. 66-67.) Should the City of Dallas be entitled to payment prior to the Federal Government, the Federal Government will receive practically nothing upon its claim.

Although Dallas was granted a charter by special act of the Legislature in 1907, it took advantage of the Home Rule Amendment of the Texas Constitution and became a home rule city long prior to 1947. (R. p. 17, Findings of the Referee; and R. p. 57, Agreement of the Parties.)

SPECIFICATION OF ERRORS RELIED UPON

(1) The Respondent does not have a lien to secure its claim under Section 194 of its charter, because said section is invalid and unconstitutional.

(2) The Respondent does not have a statutory lien for its claim valid within the meaning of Section 67b of the Bankruptcy Act.

Argument under Specification of Error No. 1

That Section 194 of the Respondent's charter is invalid and unconstitutional presents a question of Texas law, and under the rules laid down in *Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817; Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860; West v. American Tel. & Tel. Co., 311 U. S. 223, 61 Sup. Ct. 179; Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 Sup. Ct. 1020;* and *Stoner v. New York Life Ins. Co., 311 U. S. 464, 61 Sup. Ct. 336,* the lower court was bound to apply the law of Texas in this respect. It has failed to do so.

In Texas there are three kinds of cities: (1) those incorporated under the general laws of the State; (2) those incorporated by special laws of the Legislature; and (3) those incorporated under the Home Rule Amendment and

statutes. [*City of Sherman v. Municipal Gas Co., 133 Tex. 324, 127 S. W. (2d) 193.*] In 1907 the Texas Legislature by special act granted the charter to the City of Dallas. That charter contained Section 194. Subsequently, and many years prior to 1947, the City of Dallas took advantage of the Home Rule Amendment to the Texas Constitution and adopted it and became a home rule city. (R. p. 17, Findings of the Referee; and R. p. 57, Agreement of the Parties.) The lower court's opinion sustains Section 194 of the Respondent's charter from the point of view of the Respondent's charter being granted by special act of the Texas Legislature in 1907. However, the lower court is wrong on this score, as well as being wrong when the Respondent is considered as a home rule city.

(a) *Considered as a special act city, Section 194 of the charter of the Respondent is invalid and unconstitutional because it violates Section 56, Article III, of the Texas Constitution, since it is contrary to Article 1060 of the Texas Statutes, which is a general law.*

Article 1060 is found in Chapter 5 of Title 28, Cities, Towns and Villages, of Vernon's Texas Civil Statutes. It provides that all taxes shall be a lien upon the personal property on which they are assessed, and the Supreme Court of Texas has held in *Mission Independent School District, et al. v. Armstrong, 222 S. W. 201*, that the lien created by this Article of the Statutes attaches and becomes an encumbrance upon the property, as soon as the assessment is made. In the case at bar the assessment was not approved by the City Council of the Respondent until

September 23, 1947, when the ordinance was passed, and the Respondent had no lien under this general law of the State of Texas as of January 1, 1947, and prior to bankruptcy.

It is seen that Article 1060 is not limited in its sweep to any particular kind of city but applies and governs all cities in Texas and is a general law. This article does not specifically state that it is applicable to cities incorporated under the general laws as did the Article of the Statutes which was the subject of the opinion in *City of Sherman v. Municipal Gas Co., 127 S. W. (2d) 193*, and as did the Article of the Statutes which was the subject of the opinion in *Forwood v. City of Taylor, 214 S. W. (2d) 282*. Each of these cases by the Supreme Court of Texas is good authority for our position that Article 1060, being part of the Title 28 relating to cities, towns and villages in Texas, is applicable to all cities, towns and villages of all classes in Texas, because it is not specifically limited to any one class. *City of Lubbock v. South Plains Hardware Co., 111 S. W. (2d) 343*, specifically holds that this Article 1060 is a general law relating to the subject of taxation and provides for tax liens to which all cities in the State are entitled.

On the other hand, Section 194 of the Respondent's charter creates a lien for all ad valorem taxes due as of January 1st in each year and makes this lien good for not only the taxes on that piece of property to which the lien is affixed, but for any and all taxes owing by the taxpayer. These charter provisions conflict with the general law

known as Article 1060 in both respects, because under Article 1060 the lien does not attach and become an encumbrance until the assessment is made *(Mission Independent School District, et al. v. Armstrong, 222 S. W. 201)*, and the lien is good for the taxes assessed only upon that particular piece of property. [*City of Lubbock v. South Plains Hardware Co., 111 S. W. (2d) 343.*]

It is obvious that each of these laws relates to the same specific subject of taxes upon personal property and of liens to secure such taxes and, therefore, that they are repugnant to each other. *(Cole v. State, 170 S. W. 1036.)* An irreconcilable conflict between these laws exists, contrary to the holding of the lower court, because of the mandates of the Texas Constitution and the holdings of the Supreme Court which follow.

Since Section 194 of the Respondent's charter is conflicting with Article 1060, a general law of the state, said section of the Respondent's charter is invalid and unconstitutional because it violates Section 56, Article III, of the Texas Constitution. This Section of the Constitution provides that: "The Legislature shall not, excepting as otherwise provided in this Constitution, pass any local or special law authorizing: the creation, extension or impairing of liens; incorporating cities, towns or villages, or changing their charters; and in all other cases, where a general law can be made applicable, no local or special law shall be enacted." The courts of last resort in Texas have uniformly held that this constitutional provision strikes down any charter provision of a city which conflicts with

the geneal laws, no matter that said city was created by special act of the Legislature.

In *Brown v. Fidelity Investment Co., 280 S. W. 567*, the Supreme Court held that the charter provision of the City of Houston, a special act city, which denied the right of redemption to the owner of land sold for taxes was unconstitutional and void because in contravention of this Article of the Texas Constitution, since it conflicted with the general laws on the subject which granted the right of redemption, and stated:—

> "So, it seems clear to us that in framing this last-named article referring to the chartering of certain cities by special act, the framers of our fundamental law had no intention whatever to permit the passing of such a local or special act in such a way as to repeal, within any given city, the provisions of a general law applicable to other cities of the same class."

In *City of Beaumont v. Fall, 291 S. W. 202*, the Supreme Court struck down the charter provision of the City of Beaumont, a special act city and subsequently a home rule city, which provided for a statute of limitations to bar suits for taxes and in conflict with the general laws on the subject denying any statute of limitation in such suits as being in violation of this provision of the Texas Constitution, and stated:—

> "Consequently, it will be seen that both courts of last resort in this state, as well as this section of the Commission of Appeals, have definitely decided that cities cannot enact laws or ordinances which contravene general laws upon the same subject which are applicable to all cities. The Legislature was prohibited by section 56 of article 3 of the Constitution from passing any such ordinance for a city by special act."

This case quoted with approval *Brown v. Fidelity Investment Co., supra*, and cited other cases to the same effect.

It is submitted that there is no law to the contrary in the State of Texas, and that in view of this state of the law it would be impossible to sustain Section 194 of the Respondent's charter because it conflicts with the general laws of the State and, therefore, contravenes the quoted constitutional provision.

(b) *Considered as a home rule city, Section 194 of the charter of the Respondent is invalid and unconstitutional because it violates Section 5 of Article XI of the Texas Constitution, since it is contrary to Article 1060 of the Texas Statutes which is a general law.*

This Article and Section of the Texas Constitution is what is known as the home rule section and article, and it specifically provides that: "No charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." We have already seen that this section of the Respondent's charter does conflict with the general law of the State known as Article 1060 and, therefore, under the law of Texas this part of the Respondent's charter is void and unconstitutional, being in contravention of the above Section and Article of the Texas Constitution.

Again reference is made to *Brown v. Fidelity Investment Co., supra*, where the court stated:—

> "In 1912, the Home Rule Amendment was passed authorizing cities of a certain population to adopt

their own charters, with no other limitation than that its provisions should not contravene the Constitution or general laws. In substituting local self-government for legislative rule, it was still provided that no law of any given city should supersede the general law upon the same subject. This has ever been the spirit of our Constitution and law. It should remain so to the end."

And in *City of Beaumont v. Fall, supra,* it is stated:—

"Under the Home Rule Amendment, cities, acting for themselves, are likewise expressly restricted. It has never been the intention of the people of this state to permit one city to enforce a law which is contrary to a general law governing other cities of the same class."

And in this same case the court had this to say:—

"In a word, as long as the state does not, in its Constitution or by general statute, cover any field of the activity of the cities of this State, any given city is at liberty to act for itself. But, when the state itself steps in and makes a general law and applies such law to all cities of a certain class, then we submit that no city of the same class is authorized, under our Constitution, to enact contrary legislation. If this principle has not already been adopted as the settled law of this state, then it should be so understood from this time forward."

Some additional cases sustaining our position are: *Texas Power & Light Co. v. Brownwood Public Service Co., 111 S. W. (2d) 1225, writ of error refused; City of Lubbock v. South Plains Hardware Co., 111 S. W. (2d) 343; City of Lubbock v. Magnolia Petroleum Co., 6 S. W. (2d) 80; City of Waco v. Thralls, 128 S. W. (2d) 462, writ of error*

dismissed, judgment correct; Prescott v. City of Borger, 158 S. W. (2d) 578, writ of error refused.

In view of these cases and others cited therein, it is difficult to understand how the lower court held that the Respondent's charter had the same force and effect as the general law of the State, and it is also difficult to understand how the lower court cited the case of *City of Dallas v. Western Electric Co., 18 S. W. 552*, to substantiate this holding, because that case does not do so. In fact, the Supreme Court in both the *City of Beaumont* and *Brown cases, supra*, states unequivocably that the *City of Dallas v. Western Electric Co. case, supra*, is not contrary to their holding because there there was no general law of the State to the effect that garnishment against cities was permitted, and, therefore, the city charter denying garnishment did not conflict with any general law in contravention of the constitutional provision.

In view of this state of the Texas law, it is likewise difficult to understand the lower court's position that the Respondent's charter was not impliedly repealed by the subsequent Article 1060 because, in the first place, Article 1060 was not subsequent to the Respondent's charter since it has been a part of the general laws of the State of Texas since 1875, and secondly, because no provision of any charter of any city of the State of Texas can be held valid if it contravenes any general laws of the State. Nor is the lower court right in stating that this general law of the State was applicable to state and county taxes, because it is specifically made applicable to cities, towns and villages

and because other statutes of the State of Texas are applicable to state and county taxes, to-wit: Articles 7266-7274, inclusive, of Vernon's Texas Civil Statutes; and there is no provision of the Texas Statutes creating liens on personal property for taxes prior to seizure due to the state and counties. [*Cassidy Southwestern Commission Co. v. Duval County, et al., 3 S. W. (2d) 416; In re Brannon, et al., 62 Fed. (2d) 959.*]

In taking the above position, the lower court refused to consider the cases of *Texas Land & Cattle Co. v. City of Fort Worth, 73 S. W. (2d) 860; City of Lubbock v. South Plains Hardware Co., 111 S. W. (2d) 343;* and *City of San Angelo v. Deutsch, 91 S. W. (2d) 308;* all of which hold that Article 1060 of the Texas Statutes applies to home rule cities, but neither of the cases limited the application of Article 1060 to home rule cities. And it must not be overlooked that the City of Dallas, for many years prior to the beginning of this litigation, has been a home rule city.

(c) *Section 194 of the charter of the Respondent is invalid and unconstitutional because it is a local or special law creating a lien in contravention of Section 56 of Article III of the Texas Constitution.*

We have already seen that under this Article and Section of the Texas Constitution no local or special law can be passed authorizing the creation, extension or impairing of liens. This Section of the Constitution is as applicable to cities as it is to the Texas Legislature. [*Anderson, et al. v. Brandon, et al., 47 S. W. (2d)*

261.] Whether the City of Dallas is considered a special act city or a home rule city, this provision of its charter is invalid because it is a local law, applicable only to the City of Dallas, which creates a lien contrary to the above quoted provision of the Texas Constitution. The cases cited under (a) and (b) above are sufficient authority.

Article 1175 of Title 28 of Vernon's Civil Statutes of Texas, was passed to supplement the Home Rule Amendment of the Constitution, and among other provisions of that article it is provided that cities adopting such Home Rule Amendment shall have the powers: "7. To provide for the levying of any general or special ad valorem tax for any purpose not inconsistent with the Constitution of this State; 8. To provide for the mode and method of assessing taxes, both real and personal, against any person and corporation, including * * *; 9. To provide for the collection of all taxes, including the right to impose penalties for delinquent taxes." But in none of the provisions of the statute with respect to home rule cities is a home rule city given the power to legislate with respect to creating, extending or impairing liens, and, therefore, Section 194 of the Respondent's charter can in no wise be validated.

This case is unlike *Anderson, et al. v. Brandon, et al., 47 S. W. (2d) 261,* by the Supreme Court of Texas, where a charter provision of the City of Dallas with respect to liens for paving assessments was held valid because Section 16 of Article 1175 of Vernon's Texas Civil Statutes, relating to home rule cities, authorizes such cities to provide

for the construction of street improvements and building of sidewalks and to provide by special assessment a lien against such property for the cost. There the Supreme Court, in holding that this charter provision was not violative of Article III, Section 56, of the Texas Constitution prohibiting any local law for creating a lien, stated:—

> "We think the provision in subdivision (i), section 1, article 10, of the charter of the City of Dallas, here under consideration, is but the exercise by said city of a power clearly implied by a general and not a special law, in properly carrying into effect certain express powers, and does not contravene the provision of the Constitution which forbids the Legislature from enacting a local or special law creating, extending, or impairing liens. Here the lien was one created under powers expressly and impliedly granted by a general statute of the state."

Had Section 194 of the Respondent's charter provided that the lien for taxes shall be an encumbrance from the date of the assessment instead of from January 1st in each year, and shall be a lien upon the property on which the taxes are assessed instead of a lien for all taxes, it could not have been contended that such charter provision was violative of Article III, Section 56, of the Texas Constitution, because the lien would have been created under the powers expressly granted by general Statute 1060 and not in conflict therewith. But Section 194 of the Respondent's charter provides for the creation of a lien as of January 1st in each year and for said lien to secure all taxes, whether on real or personal property, or both. This was legislation by the city for the special benefit of the city which was not acting under any powers of a general

statute but was acting in face of the express mandate against passing any local or special law creating a lien, as provided in Article III, Section 56, of the Texas Constitution.

The lower court discusses and cites from the case of *In re: Brannon, et al., 62 Fed. (2d) 959*, and gives two good reasons why that case cannot rule the case at bar and, further, states that there the court pointed out that under the Texas law there was no lien on personal property for state and county taxes prior to seizure but stated that Section 194 of the charter of the City of Dallas did create a lien for city taxes from January 1st of each year. However, it must not be overlooked that in that case the taxes were for years prior to the year in which bankruptcy intervened, and the issue whether the lien should date from January 1st of the year of bankruptcy was immaterial. Whether Section 194 of the Respondent's charter was invalid, because it was in conflict with Article 1060 in its application, was not involved in that case. However, the lower court in that case recognized that Article 1060 established the time of assessment as the date the lien arose.

We have attempted to point out the errors of the lower court whose opinion would make it possible for any city in Texas to come ahead of the Federal Government and all other governmental agencies in bankruptcy proceedings by providing in its charter for a lien as of January 1st of each year. This would be an intolerable situation and would result in gross injustices. No doubt, the Legislature in

passing Article 1060 thought it had made such a situation impossible in view of the provisions of the Texas Constitution.

Argument under Specification of Error No. 2

(2) The Respondent does not have a statutory lien for its claim valid within the meaning of Section 67b of the Bankruptcy Act.

The only lien arising prior to bankruptcy in favor of the City of Dallas was, if any lien at all, an inchoate, non-specific general tax lien. The amount thereof was not known and could not be known until the assessment was made some seven months after bankruptcy occurred.

Can such a so-called lien be a "statutory lien for taxes" which may be valid against the Trustee within the meaning of Section 67b of the Bankruptcy Act, as amended?

There is no definition within the amended Section 67b of a "statutory lien for taxes." And no decision upon the section, defining that term, is to be found.

The definition of a "statutory lien for taxes" has, however, been a point of decision and the subject of exhaustive, decisive discussion, in no less than five opinions of this Honorable Court in recent years. The subject of the essential elements of a true lien for taxes as distinguished from an inchoate, non-specific, general right to a tax lien, has been so fully explored as to admit of no doubt as to what constitutes a true lien.

The decisions have each been based upon the application of Section 3466 of the Revised Statutes of the United States (31 U. S. C. 191). The section provides that in insolvency cases the debts of the United States shall be first satisfied. The section is not considered to be applicable in bankruptcy cases. However, the analogy is so complete as to make the decisions in these cases particularly apropós and enlightening here.

The decisions are *Illinois v. Campbell, 329 U. S. 362, 67 Sup. Ct. 340; United States v. Waddill, et al., 323 U. S. 353, 65 Sup. Ct. 304; United States v. State of Texas, 314 U. S. 480, 62 Sup. Ct. 350; New York v. Maclay, 288 U. S. 290, 53 Sup. Ct. 323;* and *Spokane County v. United States, 279 U. S. 80, 49 Sup. Ct. 321.*

A point for decision in each case was whether a state statutory lien for taxes arising prior to insolvency would in insolvency cases prevail over unsecured claims of the United States. In each case this Court was expressly able to avoid a decision upon the point. The so-called statutory tax lien asserted in each case by a state or subdivision thereof was the type of lien claimed by Respondent in this case. That is to say, each such lien was at the time insolvency occurred an inchoate, general lien non-specific as to either the amount of the lien or the property to which it attached or both. This Honorable Court in each case came to the conclusion that such an inchoate, general lien constituted in fact and in law no lien at all but a mere caveat of a lien to come, and, that being no lien, it could not prevail over the unsecured claim of the United States

and it was, therefore, unnecessary for the Court to decide the point as to whether a true specific lien would in such case prevail.

A quotation from the most recent of these decisions, *Illinois v. Campbell, supra*, demonstrates the rationale and allows the forbearance of the tedium of repeated quotation. The conflicting claims were those of the State of Illinois to a statutory lien for unemployment compensation contributions and the unsecured claim of the United States for taxes upon an insolvent fund insufficient to pay both. The Court said:—

> "(The argument) that the lien of the state was so specific and perfected as to defeat the priority, if any, of the United States under Rev. Stat., Sec. 3466, must be met before the case can be affirmed * * *.
>
> "The United States was given priority now incorporated in Rev. Stat. Sec. 3466, in 1797. 1 Stat. 515. * * * Yet the Court has never decided whether the priority is overcome by a fully perfected and specific lien. * * * The question, however, has been reserved many times in express terms. See Conrad v. Atlantic Insurance Co., 1 Pet. 386, 442; Brent v. Bank of Washington, 10 Pet. 596, 611-612; Spokane County v. United States, 279 U. S. 80, 95; New York v. Maclay, 288 U. S. 290, 294; United States v. State of Texas, 314 U. S. 480, 485-486; United States v. Wadill Co., 323 U. S. 353, 355. And again we need not decide it, for we are of the opinion that the Illinois lien was not sufficiently specific or perfected, in the purview of controlling decisions, to defeat the Government's priority.
>
> "The long-established rule requires that the lien *must be definite, and not merely ascertainable in the future by taking further steps, in at least three respects as of the crucial time.* These are: (1) The ident-

ity of the lienor, United States v. Knott, 298 U. S. 544, 549-551; (2) *the amount of the lien*, United States v. Wadill Co., 323 U. S. 357-358; and (3) the property to which it attaches, United States v. Waddill Co., supra; United States v. Texas, supra; New York v. Maclay, supra. It is not enough that the lienor has power to bring these elements or any of them, down from broad generality to the earth of specific identity.

"* * * Here (with respect to the lien claimed, for want of specificity as to one of the three respects as of the crucial time in which definity is required) as in United States v. Waddill Co., supra, and other cases, there was merely 'a caveat of a more perfect lien to come,' New York v. Maclay, 288 U. S. 294, whether tested by state law, 323 U. S. 357, or by perfection 'as a matter of actual fact, regardless of how complete it (the lien) may have been as a matter of state law'." (Parenthetical statements supplied.)

It follows, necessarily, that the Respondent's so-called general tax lien, non-specific as of the crucial time as to amount, was no lien at all but merely an inchoate general right to a lien to come.

It will be observed that in 1938 when the amendment creating the present Section 67b of the Bankruptcy Act was enacted, the decisions in *New York v. Maclay, supra*, and *Spokane County v. United States, supra*, establishing the principle that inchoate, non-specific, general so-called statutory tax liens were no liens at all, had long since become the law of the land. Congress, in that circumstance, must be understood to have intended the term "statutory lien for taxes" used in the amendment to comprehend only true, specific liens. Certainly it could not be understood to have intended to embrace within that term, without more

express definition, rights, however denominated by state law which under the supreme law are not liens at all.

To hold that the term "statutory lien for taxes" as used in Section 67b as amended, embraces the inchoate, general, non-specific so-called lien claimed by Respondent, is to lead to an absurd result. In that case, it will be observed, on identical facts in insolvency cases, the United States would prevail in the State Courts, and in the Federal Courts in receivership cases, to the exclusion of the city, and the city would prevail in the bankruptcy Court to the exclusion of the United States. And this, not upon merit but upon the fortuitous circumstance of forum. Reason admits of no such folly. Such hiatus cannot be allowed to exist if by reasonable construction of statutes it can be avoided.

True, Section 67b contains reference to statutory liens requiring further steps to be perfected and provides that where such liens arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the Court.

The provision in no way weakens the argument advanced on this point or the compelling force of the five decisions of this Honorable Court. The section refers to liens. In the light of this Court's decisions, obviously intended is a specific lien requiring, to be perfect, the further frequently required familiar steps of notice and/or seizure. That is to say, under the saving clause, a lien specific *as of the*

crucial time in at least three respects: (1) the identity of the leinor; (2) *the amount of the lien;* and (3) the property to which it attaches may be valid against the Trustee even though to be perfect further steps such as notice or seizure are required. A right to lien, non-specific as of the crucial time in any one of the three respects, is no lien at all.

Petitioner submits that Respondent's inchoate, non-specific, so-called general tax lien is no lien at all and certainly not a "statutory lien for taxes" which may be valid against the Trustee within the meaning of Section 67b of the Bankruptcy Act, as amended.

CONCLUSION

Petitioner respectfully prays that the accompanying petition for writ of certiorari be granted, that the errors in the judgment of the United States Court of Appeals be corrected and reversed, and that the judgment of the District Court be affirmed.

Respectfully submitted,

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APPENDIX

Article III, Section 56, of the Texas Constitution provides:—

> "The Legislature shall not, excepting as otherwise provided in this Constitution, pass any local or special law authorizing: the creation, extension or impairing of liens; incorporating cities, towns or villages, or changing their charters; and in all other cases, where a general law can be made applicable, no local or special law shall be enacted."

Article XI, Section 5, of the Texas Constitution provides:—

> "Cities having more than 5,000 inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or with the general laws enacted by the Legislature of this State * * *."

Article 1060 of Vernon's Texas Civil Statutes provides:—

> "The assessor and collector shall have power to levy upon any personal property to satisfy any tax imposed by this title. All taxes shall be a lien upon the property upon which they are assessed, and in case any property levied upon is about to be removed out of the city, the assessor and collector shall proceed to take into his possession so much thereof as will pay the taxes assessed and the costs of collection."

Section 194 of the City Charter of Dallas, Texas, provides:—

> "A lien is hereby created on all property, personal and real, in favor of the City of Dallas, for all taxes, ad valorem, occupation or otherwise. Said lien shall exist from January 1st in each year until the taxes are paid. Such lien shall be prior to all other claims, and no gift, sale, assignment or transfer of any kind, or judicial writ of any kind, can ever defeat such lien, but the Assessor and Collector of Taxes can pursue such property, and whenever found out, may seize and sell enough thereof to satisfy such taxes.
>
> "All persons or corporations owning or holding personal property or real estate in the City of Dallas on the first day of January of each year shall be liable for all municipal taxes levied thereon for such year.
>
> "The personal property of all persons owing any taxes to the City of Dallas is hereby made liable for all of said taxes, whether the same be due upon personal or real property, or upon both."

Article 1175, Title 28, of Vernon's Civil Statutes of Texas provides:—

> "Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:
>
> "* * *.
>
> "7. To provide for the levying of any general or special ad valorem tax for any purpose not inconsistent with the Constitution of this State.
>
> "8. To provide for the mode and method of assessing taxes, both real and personal, against any person and corporation, including * * *.
>
> "9. To provide for the collection of all taxes, including the right to impose penalties for delinquent taxes."

Title 31, Section 191, United States Code, provides:—

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Title 11, Section 104(a), United States Code, provides:—

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court * * *.

[Items (1), (2) and (3) of the above Section 104 cover costs of administration and wage claims].

Title 11, Sections 107b and 107c, United States Code provides:—

"b. The provisions of Section 96 of this title to the contrary notwithstanding, statutory liens in favor of employees, contractors, machanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or sub-

division thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapters 10, 11, 12, or 13 of this title, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

"c. Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under chapters 10, 11, 12, or 13 of this title, though valid under subdivision b of this section, statutory liens, including lines for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens whether statutory or not, of distress for rent shall be postponed in payment of the debts specified in clauses (1) and (2) of subdivision a of section 104 of this title * * *."